

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

SHYLIA R DAMPIER
Claimant

APPEAL NO. 13A-UI-07733-VS

**ADMINISTRATIVE LAW JUDGE
DECISION**

AT&T MOBILITY SERVICES LLC
Employer

OC: 06/02/13
Claimant: Appellant (2R)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a representative's decision dated June 21, 2013, reference 01, which held that the claimant is not eligible for unemployment insurance benefits. After due notice, a hearing was held on August 7, 2013, in Davenport, Iowa. The claimant did not appear for the hearing. The employer appeared by Michael Kelly, quality manager. Alyce Smolsky was the employer's representative. The record consists of the testimony of Michael Kelly and Employer's Exhibits 1-5.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, after hearing the testimony of the witness and considering all of the evidence in the record, makes the following findings of fact:

The employer is a call center located in Davenport, Iowa. The claimant was hired on June 21, 2010, as a customer service representative. She was a full-time employee. Her last day of work was June 2013. She was terminated on June 4, 2013, for unsatisfactory attendance.

The claimant's attendance record is as follows:

April 3, 2013	Left work due to illness
April 2, 2013	Left work due to illness
April 1, 2013	III
March 29, 2013	III
March 27, 2013	III
March 26, 2013	III
March 21, 2013	Left work early for personal business
March 19, 2013	Personal reasons
February 15, 2013	Late from lunch
February 14, 2013	III
December 21, 2013	Late from lunch
December 19, 2013	Late from lunch

December 9, 2012 III
July 1, 2012 III
June 1, 2012 III

The claimant properly notified the employer on all of her absences.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The concept includes tardiness and leaving early. Absence due to matters of personal responsibility, such transportation problems and oversleeping, is considered unexcused. See Harlan v. IDJS, 350 N.W.2d 192 (Iowa 1984). Absence due to illness and other excusable reasons is deemed excused if the employee properly notifies the employer. See Higgins, supra, and 871 IAC 24.32(7) In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8) See also Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988) The employer has the burden of proof to show misconduct.

The claimant is eligible for unemployment insurance benefits. The claimant's final absence was due to personal illness that was properly reported to the employer. Personal illness properly reported is considered an excused absence under Iowa unemployment insurance law. Since

the claimant's final absence was excused she was not discharged for a current act of misconduct. The final absence must be an unexcused absence. If it is not, as is the case here, the claimant is not disqualified from receiving benefits. There is no disqualification based on the separation of employment.

The administrative law judge is concerned about whether the claimant is able and available for work given the number of absences she had for personal illness and her failed attempt to apply for Family Medical Leave Act (FMLA) leave. The claims section has not yet had an opportunity to address the issue of whether the claimant is able and available for work. This matter is remanded to the Claims Section for a determination of that issue.

DECISION:

The decision of the representative June 21, 2013, reference 01, is reversed. Unemployment insurance benefits are allowed if the claimant meets all other eligibility requirements. This matter is remanded back to the Claims Section for a consideration of the able and available issue.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css